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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
8

9 EDWARD CARRILLO, JR.,)

10 Petitioner,)

11 vs.)

12 FEDERAL BUREAU OF PRISONS, et)
13 al.,)

14 Respondents.)

No. CIV 08-520-TUC-CKJ

ORDER

15 Pending before the Court is Petitioner's Petition under 28 U.S.C. § 2241 for a Writ
16 of Habeas Corpus by a Person in Federal Custody. Respondents have filed a Response and
17 an Amended Declaration and Petitioner has filed a Reply.

18
19 *Factual and Procedural Background*

20 Petitioner Edward Carrillo, Jr., ("Carrillo") was arrested by the Maricopa County
21 Sheriff's Department on state fraud charges on March 2, 2005. He was released on bond on
22 March 4, 2005. Carrillo was again arrested on state fraud charges on July 19, 2005. Carrillo
23 was sentenced by the State of Arizona to a term of five years imprisonment on July 28, 2006.
24 Carrillo received 374 days of presentence credit on his Arizona sentence. Carrillo is
25 projected to complete this sentence on August 15, 2009.

26 On September 20, 2006, Carrillo was brought into federal custody via a writ of habeas
27 corpus ad prosequendum. Carrillo was sentenced to a 37 month term of imprisonment, to be
28 followed by three years of supervised release, for mail fraud in violation of 18 U.S.C. § 1342

1 in the District of Arizona on February 5, 2007. This sentence was ordered to run
2 concurrently with Carrillo's Arizona sentence. Carrillo's federal sentence is projected to be
3 completed on October 8, 2009. Carrillo was returned to state custody on February 14, 2007.

4 On September 18, 2008, Carrillo filed his Petition under 28 U.S.C. § 2241 for a Writ
5 of Habeas Corpus by a Person in Federal Custody. Carrillo asserts that time spent in custody
6 prior to his sentencing should be credited against his federal sentence. On November 4, 2008,
7 Respondents filed an Answer and Response and, on November 21, 2008, filed an Amended
8 Declaration. On November 21, 2008, Carrillo filed a Reply.

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10 *Jurisdiction of the Court*

11 "Federal courts are always 'under an independent obligation to examine their own
12 jurisdiction,' and a federal court may not entertain an action over which it has no
13 jurisdiction." *Hernandez v. Campbell*, 204 F.3d 861, 865 (9th Cir. 2000), *quoting FW/PBS,*
14 *Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). In the case of a habeas petition, such
15 jurisdiction is dependent upon a proper characterization of the petition.

16 "Generally, motions to contest the legality of a sentence must be filed under § 2255
17 in the sentencing court, while petitions that challenge the manner, location or condition of
18 a sentence's execution must be brought pursuant to § 2241 in the custodial court."
19 *Hernandez*, 204 F.3d at 864. Therefore, this Court's jurisdiction depends upon a proper
20 characterization of Carrillo's claims. Carrillo is challenging the manner, location or
21 condition of the execution of his sentence. *See e.g., Rogers v. United States*, 180 F.3d 349
22 (1st Cir. 1999) (section 2241 petition is appropriate vehicle to challenge the correctness of
23 a jail-time credit determination, once administrative remedies have been exhausted). Such
24 a challenge must be brought pursuant to § 2241 in the custodial court. Carrillo being
25 incarcerated at the Arizona State Prison complex in Tucson, Arizona, this Court is the
26 custodial court. This Court has jurisdiction over this matter.

1 *Exhaustion of Administrative Remedies*

2 The Ninth Circuit Court of Appeals has stated:

3 [28 U.S.C. § 2241] does not specifically require petitioners to exhaust direct appeals
4 before filing petitions for habeas corpus. [Footnote omitted.] However, we require,
5 as a prudential matter, that habeas petitioners exhaust available judicial and
6 administrative remedies before seeking relief under § 2241.

7 *Castro-Cortez v. INS*, 239 F.3d 1037, 1047 (9th Cir. 2001), *abrogated on other grounds*,

8 *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 126 S.Ct. 2422, 165 L.Ed.2d 323 (2006).

9 Respondents having not asserted that Carrillo has failed to exhaust his administrative
10 remedies, the Court will review the Petition.

11 *Credit for Pre-Sentence Incarceration*

12 The calculation of a term of imprisonment may include credit for prior custody:

13 (b) Credit for prior custody. – A defendant shall be given credit toward the service
14 of a term of imprisonment for any time he has spent in official detention prior to the
15 date the sentence commences –

16 (1) as a result of the offense for which the sentence was imposed;

17 or

18 (2) as a result of any other charge for which the defendant was arrested after
19 the commission of the offense for which the sentence was imposed;

20 that has not been credited against another sentence.

21 18 U.S.C. § 3585(b). In enacting this statute, “Congress made clear that a defendant could
22 not receive a double credit for his detention time.” *United States v. Wilson*, 503 U.S. 329,
23 337, 112 S.Ct. 1351, 117 L.Ed.2d 593 (1992); *see also Boniface v. Carlson*, 856 F.2d 1434,
24 1436 (9th Cir. 1988), *per curiam*.

25 Moreover, a federal sentence does not begin when a federal defendant is produced for
26 prosecution by a federal writ of habeas corpus ad prosequendum from state custody. *Thomas*
27 *v. Whalen*, 962 F.2d 358 (4th Cir. 1992); *Thomas v. Brewer*, 923 F.2d 1361 (9th Cir. 1991).
28 Federal custody does not begin until the state authorities relinquish the prisoner on
satisfaction of the state obligation. *Del Guzzi v. United States*, 980 F.2d 1269 (9th Cir.

1992); *Whalen*. The sovereign which first arrested an offender has primary jurisdiction over that offender, unless that sovereign relinquishes it to another sovereign (through, for example, bail release, dismissal of the state charges, parole release, or expiration of state sentence). *See e.g., United States v. Warren*, 610 F.2d 680 (9th Cir. 1980). Borrowing a prisoner from state custody which is the primary custodian via a writ of habeas corpus ad prosequendum does not result in the original sovereign relinquishing its primary jurisdiction. Additionally, the United States Supreme Court has determined that the United States Attorney General continues to retain authority to award presentence jail credit, not the district courts. *Wilson*, 503 U.S. at 337.

Carrillo received 374 days of presentence credit towards his State of Arizona sentence. Indeed, Carrillo has acknowledged that he has received this credit. Reply, p. 2. This credit included the period of time from July 19, 2005, to July 27, 2006. Carrillo has not alleged or shown that time in official detention prior July 28, 2006, has not been credited against his state sentence. Moreover, from October 20, 2006, through February 14, 2007, Carrillo remained in primary custody of the State of Arizona. In other words, Carrillo was not in official detention as a result of the offense for which the sentence was imposed. Moreover, Carrillo has not alleged or shown that he was in custody for any other charge for which the defendant was arrested *after* the commission of the offense for which the sentence was imposed.

Carrillo has received credit toward the state sentence. Unlike *United States v. Smith* 318 F.Supp.2d 857 (C.D.Cal. 2004), the documentation before the Court shows that 18 U.S.C. § 3585(b) is inapplicable. Further, Carrillo's reliance on *Ruggiano v. Reish*, 307 F.3d 121 (3rd Cir. 2002), is misplaced. *Ruggiano* found that a federal sentence does not begin to run when a prisoner is transferred from state to federal custody pursuant to a writ of habeas corpus ad prosequendum. 307 F.3d at 126. Rather, the state retains primary custody of the prisoner. *Rios v. Wiley*, 201 F.3d 257, 274 (3rd Cir. 2000). The *Ruggiano* decision was based on the authority of a sentencing court to recognize time served for another offense

1 under U.S.S.G. §5G1.3(c).¹ Carrillo has not alleged that the court that sentenced him sought
2 to grant any such credit.

3 Carrillo also argues that the time served in state custody was the product of federal
4 law enforcement officials such that the state jail time is the practical equivalent of a federal
5 time. *United States v. Harris*, 876 F.2d 1502 (11th Cir. 1989). However, even if Carrillo
6 could sustain his burden to show that the time in state custody was *exclusively* the product
7 of federal law enforcement officers, *id.* at 1506, such credit is only available if 18 U.S.C. §
8 3585(b) is applicable (i.e., if Carrillo had not already received credit against his state
9 sentence). *See Vega v. United States*, 493 F.3d 310 (3rd Cir. 2007).

10
11 *Concurrent Sentences*

12 Carrillo further asserts that he is entitled to additional credit because the plea
13 agreement in the state proceedings provided for concurrent sentences. However, Carrillo's
14 federal sentence is running concurrently with his state sentence. *See* Petition, Attachment
15 D. However, the concurrent nature of the sentences did not begin until Carrillo received his
16 federal sentence on February 5, 2007. *See e.g., Taylor v. Reno*, 164 F.3d 440 (9th Cir. 1998)
17 (sentence does not commence when it is imposed, but when defendant is received into
18 custody or arrives at facility at which he is to serve sentence). Until the time of Carrillo's
19 federal sentencing, there was no federal sentence to run concurrent with Carrillo's state
20 sentence. Carrillo has not shown any basis for any further credit towards his sentence.


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22 Accordingly, IT IS ORDERED:

23 1. The Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241 is DENIED
24 and this matter is DISMISSED WITH PREJUDICE.

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26 ¹The Court notes that numerous decisions have disapproved of *Ruggiano* and/or
27 recognized its abrogation. *See e.g., United States v. Destio*, 153 Fed.Appx. 888 (3rd Cir.
28 2005); *United States v. Simmons*, 450 F.Supp.2d 574 (Ed.D.Pa. 2006).

2. The Clerk of the Court shall enter judgment and shall then close its file in this matter.

DATED this 3rd day of February, 2009.


Cindy K. Jorgenson
United States District Judge